

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

ALMA J. MILAM,
Plaintiff/Appellant,

vs.

MCI TELECOMMUNICATIONS
CORPORATION and GALLAGHER
BASSETT SERVICES,

Defendants/Appellees.

) SHELBY CHANCERY
) NO. 104128-3 R.D.
) **FILED**
) Hon. D. J. Alissandratos,
) Chancellor
) **February 10, 1997**
) NO. 02S01-9604-CH-00040
) **Cecil Crowson, Jr.**
) Appellate Court Clerk
)
)
)
) AFFIRMED.

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Appellant, and surety, for which execution may issue if necessary.

IT IS SO ORDERED this 10th day of February, 1997.

PER CURIAM

(Reid, J., not participating)

AT JACKSON

ALMA J. MILAM,

)

) NO. 02-S01-9604-CH-00040

Plaintiff-Appellant,

)

)

v.

) SHELBY CHANCERY COURT

) NO. 104128-Part III

MCI TELECOMMUNICATIONS

)

CORPORATION and GALLAGHER

) HONORABLE D. J.

ALISSANDRATOS,

BASSETT SERVICES,

)

CHANCELLOR

)

Defendants-Appellee,

)

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MEMORANDUM OPINION

Members of Panel

Lyle Reid, Associate Justice, Supreme Court

F. Lloyd Tatum, Special Judge

Joe C. Loser, Jr., Special Judge

AFFIRMED

Tatum, Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law.

This is an appeal by the employee plaintiff, Alma J. Milam,

from a judgment in favor of MCI Telecommunications Corporation, the employer/defendant. The plaintiff, prior to trial, voluntarily dismissed the suit with prejudice as to Gallagher Bassett Services, Inc.

On this appeal, the Plaintiff presents two issues:

Issue Number 1: Did the trial court commit error by finding significant questions of causation and in the process rule against Plaintiff?

Issue Number 2: Did the trial court commit error in finding that the Plaintiff failed to prove by a preponderance of the evidence that the Plaintiff suffered a permanent partial disability as a result of her on the job injury?

In arguing Issue Number 1, the Plaintiff says that causation was not an issue in this case; that it was stipulated by the Defendant. In an oral pronouncement of his findings, the trial judge, after hearing all the evidence and argument of counsel stated:

The Court finds that there is regretfully a significant question of causation, degree and [sic] credibility of the Plaintiff. And regretfully the Court finds that none of these can be resolved in favor of the Plaintiff.

It was the theory of the Plaintiff that in April, 1993, an air conditioner vent fell onto her head at her work place causing her to have severe headaches since that time and that these headaches are

permanent and disabling. It was the Defendant's theory that the accident caused the Plaintiff no permanent injury or disability.

In arguing that there was no issue as to causation, the Plaintiff relies upon two statements made by defense counsel. The first statement relied upon was made during the opening remarks of defense counsel as follows:

There is no contest, your Honor, that this --- Ms. Milam sustained an injury by accident arising out of and in the course of her employment. The issue in this case is does she have any disability as a result of that accident, that's it."

The above is no admission or stipulation that the accident was the causation of any disability or permanent injury on the part of the Plaintiff. This was merely a statement that the testimony of the Plaintiff that an accident occurred would not be contested. Defense counsel made a specific statement that the issue in the case was whether the Plaintiff had a disability as a result of the accident.

The Plaintiff relies upon another statement made by defense counsel during his argument at the conclusion of the Plaintiff's proof for a directed verdict. Counsel stated:

As you know, your Honor, it goes without saying that the Plaintiff bears the burden of proving two things as a threshold to recovering any benefits. And that is permanency of the condition and causation.

I don't think there is any way I could make this

The defense counsel was stating that he could not make an argument for a directed verdict on the issue of causation. At least one

of the doctors who testified rendered the opinion that the Plaintiff was permanently disabled by her headaches and that the causation for the disability was the on the job accident. With this testimony, it is obvious that there was a question of fact to be determined on the causation issue and that a motion for a directed verdict on this question would be frivolous. This is not a stipulation that the accident caused any permanent disability. Incidentally, the motion for a directed verdict was overruled by the trial court. The first issue is without merit.

In the second issue, we are called upon to determine whether the preponderance of the evidence requires a finding that the Plaintiff suffered a permanent disability as a result of injuries she sustained in the accident. This issue overlaps the first issue and our discussion is also applicable to the first issue.

The Plaintiff testified that she was forty-five years of age and had a high school education. She finished three years of college and had further training in banking. She has worked as a bank teller, substitute teacher, and a post office clerk.

At the suggestion of the trial court, the details of the accident were not testified to. She was an employee at MCI Communications as a customer service representative. This work involved the helping of customers with their problems by telephone.

The Plaintiff testified that during trial, on a scale of one to ten, she had a number seven headache. A number one headache was

very mild and a number ten is very severe on this scale. She said that she was nauseated at the time of trial.

She returned to work for about a week or week and one-half while being treated by Dr. Empting. Dr. Empting sent her back to work but she was unable to work because of her headaches. She testified that she had to leave the telephone every day because of the headaches and the employer would not permit her to go to the rest room. She testified that she suffered with nausea, blurred vision and dizziness. She cannot drive.

She testified that she had from one to five headaches per day. At another point she testified that she had headaches three or four times per week and again she testified that since the accident she has not had a solid day free of headaches. She testified that on the one to ten scale, some of her headaches were between number two and number three and others are eleven. She testified that she could go back to work for MCI on a part-time basis "if they would let her."

She testified that her superior gave her a "one on one." This is a warning orally given by the supervisor and the next step is termination according to her.

She has been treated mainly by Dr. Wright who last saw her on May 16, 1995. She testified that she has not improved since the accident. Dr. Wright has tried her on between forty and fifty medications for the migraine headaches. Some are not effective and she has side effects from the others. Dr. Wright prescribed a drug

called imitrex, but she cannot afford this and her employer will not pay for it. She testified that she was on blood pressure medication.

On cross-examination, the Plaintiff testified that she had hypertension and that the medication given to her for hypertension caused severe headaches before the accident. She denied having blurred vision before the accident but testified that she had blurred vision since the accident. She denied having trouble sleeping before the accident and denied telling a doctor that she had trouble sleeping before the accident.

On cross-examination she was presented with a form that she had filled out for a Dr. Patchen at the Health First Medical Group on January 5, 1993 before the accident occurred in April, 1993. On this form, she stated that she had blurred vision, ringing ears and sinus trouble. Though she marked that she had sinus trouble she testified that this was hay fever, but she did not check the mark for hay fever. On the form under the heading "miscellaneous complaints" she reported that she had headaches and inability to sleep. She identified a document from Dr. Patchen dated January 5, 1993, stating that her hypertension was severe and that medication caused the headaches. She testified that the medication also caused the blurred vision. She admitted that before the accident she had regular headaches.

Elizabeth Courturier, a supervisor, at MCI, testified that she was a customer service representative in 1992 and worked with the plaintiff. During this period, the plaintiff complained to her of having headaches. She and another supervisor disputed Plaintiff's testimony

that termination would be considered after the "one on one". They testified that there were several steps to be taken before termination could be considered.

The testimony revealed that these supervisors would have worked with the Plaintiff had Dr. Wright placed restrictions on her when she was released by him to return to work. The doctor placed no restrictions on the Plaintiff that would enable these supervisors to work with her and make exceptions for her.

Dr. Lance J. Wright testified for the Plaintiff by deposition. He had been practicing neurology for three and one-half years at the time his deposition was taken on October 20, 1994.

Dr. Wright first saw plaintiff on June 7, 1993. He obtained a history that the plaintiff had been having headaches since April, 1993, when an air conditioner vent fell on her head. She did not lose consciousness according to the history that she gave to the doctor. She had no lacerations when he saw her.

Dr. John Crockerall, an associate of Dr. Wright, saw the Plaintiff before Dr. Wright. Dr. Crockerall ordered a CAT scan and EEG which Dr. Wright reviewed. Both were normal. Dr. Wright's examination revealed no anatomical disorder, no nerve disorder, no psychological disorder or clinical depression. His diagnosis based on history and complaints given to him by the Plaintiff was post-traumatic chronic headache. Dr. Wright continued to treat the Plaintiff until August, 1994, when he released her without restriction.

Dr. Wright treated the Plaintiff with some eight to ten medications but she had side effects from them. For example, one medication caused wheezing, another caused depression and another increased her blood pressure. She improved with some of these medications as long as she could take them.

By May 18, 1994, her headaches had improved with time and without medication. By then, according to what she told the doctor, the headaches were no longer occurring every day, but were occurring at least two times per week.

Dr. Wright testified that "some headaches after head trauma will last a week, some will last a year, and some will last for thirty years." Dr. Wright testified that the Plaintiff had a permanent partial disability rating of fifteen percent to the body as whole which he based on chronic pain. The pain was not related to an anatomical defect referred to in the AMA Guidelines. Dr. Wright testified that there is nothing in the guidelines that will directly support the fifteen percent disability figure. He gave a functional disability rating and not an anatomical impairment rating.

Dr. Wright referred Plaintiff to Dr. Atkins, a psychologist, who saw her on December 9, 1993. Dr. Atkins reported to Dr. Wright that the Plaintiff complained of a "number 9" headache at the time he saw her but she showed no evidence of distress or discomfort. The number 9 figure was on the scale of zero to ten.

Dr. Anthony Segal, a neurosurgeon, saw the Plaintiff on

August 5, 1993. She gave him a history similar to that given to Dr. Wright, but she told him that she was in fact knocked unconscious in the accident that occurred on April 27, 1993. She described the air conditioner vent to be about two feet long and nine inches wide, made of thin metal. She told him that she had some headache immediately and a couple of days later started having migraine type headaches. At the time Dr. Segal saw her, she said that she was having headaches once or twice a week.

Dr. Segal testified that the Plaintiff was five feet four inches tall and weight two hundred ten pounds. The neurological examination was entirely normal and she demonstrated no excess pain behavior. Dr. Segal testified that her history and complaints were typical of post-traumatic migraine "as we see it in patients who have not had migraines previously." He testified that this condition clears from "six months to a year or even eighteen months from the accident." Dr. Segal thought at the time that he saw her that she should be left with no impairment rating.

Dr. Robert Paul Christopher also testified by deposition. He is a rehabilitation medicine expert and is a professor and chief of the division of rehabilitation medicine at the University of Tennessee Medical School. He teaches assessment of impairment with reference to the AMA Guidelines and has been taught by some of the authors of the guidelines. Dr. Christopher never saw the Plaintiff, but he has reviewed the notes of Dr. Lance Wright, the deposition of Dr. Wright, the notes of Dr. Crockerall, the report from Dr. Keith Atkins and several reports from Dr. L.D. Empting. Dr. Christopher testified that Dr. Wright

had given a disability rating and not an impairment rating. He stated that an impairment rating is the anatomical loss of function due to illness or injury. A disability rating includes anatomical impairment and also takes into account other factors. An impairment rating is given by a physician, but a disability rating is given by courts. In his opinion, she did not have an impairment rating according to AMA Guidelines.

The telephone deposition of Dr. Larry Duane Empting was taken by the Defendant. He is board certified in both psychiatry and neurology.

Dr. Empting testified that he first saw the Plaintiff on January 17, 1994. She gave a history of having been struck on the vertex of the head by a five pound ventilator metal panel in April, 1993. She told him that she developed ongoing severe headaches two or three times per week and then a chronic daily headache superimposed upon that. She gave him no history of having headaches before the accident. She told him that she did not lose consciousness and that she had a knot or swelling on her head but no laceration. The blow to her head was cushioned by a wig.

After conducting an examination which he found to be normal, he concluded that she had post concussion migraines. He testified that she was on the mild end of the spectrum of migraines. The most severe has stroke-like symptoms. He prescribed desipramine and calan.

On February 7, 1994, she returned complaining of a jittery sensation and some nausea. The jittery sensation could come from desipramine and the nausea could come from calan. She had already discontinued the desipramine. He then prescribed a drug called depakene. Dr. Empting testified that the side effects were minor, could be tolerated and would not prevent her from performing her duties at MCI.

On February 28, 1994, she returned still complaining of headache and side effects and she felt that medication was not worth trying. She was complaining of nausea, but she had no vomiting or dehydration and her appetite was not reduced.

The doctor did not prescribe any further medicine because she would not tolerate the minor side effects of the medication. She told the doctor that she had rather tolerate the headaches than the side effects. Dr. Empting thought that she could perform her job with the headaches and released her for work on March 1, 1994, without restrictions.

A plaintiff seeking workers' compensation benefits has the burden of proving every element of her claim by a preponderance of the evidence. Tinall v. Waring Park Association, 725 S.W.2d 935 (Tenn. 1987). Appellate review is de novo upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tennessee Code Annotated § 50-6-225(e)(2). This tribunal is required

to conduct an independent examination of the evidence to determine where the preponderance of the evidence lies. Wingert v. Government of Sumner County, 908 S.W.2d 921 (1995).

Where the trial judge has seen and heard witnesses, especially when issues of credibility and weight to be given oral testimony are involved, on review considerable deference must still be accorded to those circumstances. Townsend v. State, 826 S.W.2d 434 (Tenn. 1992). However, this tribunal is as well situated to gauge the weight, worth and significance of deposition testimony as the trial judge. Seiver v. Greenbriar Industries, Inc., 906 S.W.2d 444 (Tenn. 1995). All of the medical proof in this case was by deposition. The other evidence was by oral testimony.

There are numerous discrepancies in the Plaintiff's oral testimony which we have not attempted to describe in this opinion. She demonstrated no outward signs of pain or discomfort when visiting her various doctors, but after their depositions were taken she did demonstrate facial expressions of pain in court. She gave none of her doctors the history of previous headaches in 1992 and in January 1993 before the accident in April. While she insisted the headaches prevented her from working at a job which she said that she enjoyed, at her request she had her four year old grandchild taken from day school and the Plaintiff cared for her.

As above stated, we must give deference to the conclusions of the trial judge who had an opportunity to observe and hear the witness' testimony and we find that the evidence is sufficient

to support the conclusion of the trial judge that the witness was not credible. All of the doctors based their conclusions solely upon what the Plaintiff told them. Her credibility has been successfully attacked. The doctors did not know of the plaintiff's prior history of headaches. The only doctor who supports the plaintiff's claim for permanent disability is Dr. Wright, who did not base his estimate on the guidelines and did not render an impairment rating. He discharged her to return to work without restriction.

We have carefully reviewed this entire record and find that the evidence does not preponderate against the trial court's judgment. We concur that the Plaintiff has failed to prove her case with a preponderance of the evidence. It results that the judgment of the trial court is affirmed.

Costs are adjudged against the Plaintiff.

F. LLOYD TATUM, JUDGE

CONCUR:

LYLE REID, ASSOCIATE JUSTICE

JOE C. LOSER, JR., JUDGE

